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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 233

CITY BANK FARMERS TRUST COMPANY, as Trustee under Deed of Trust made by Bernarr Macfadden, dated April 7, 1932 for the benefit of Mary Macfadden, and

MARY MACFADDEN,

Petitioners,

—against—

BERNARR MACFADDEN FOUNDATION, INC., and

EDWARD F. BODIN and PAUL WINKLER, as Executors of the Last Will and Testament of Bernarr Macfadden, deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

MAURICE V. SELIGSON
285 Madison Avenue
New York, N.Y.
Attorney for Petitioners

TURK, MARSH, OUCHTERLONEY, KELLY & HOARE
666 Fifth Avenue
New York, N.Y.
of Counsel

Dated: June 21, 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No.

CITY BANK FARMERS TRUST COMPANY, as Trustee under Deed of Trust made by Bernarr Macfadden, dated April 7, 1932 for the benefit of Mary Macfadden, and

MARY MACFADDEN,

Petitioners,

—against—

BERNARR MACFADDEN FOUNDATION, INC., and EDWARD F. BODIN and PAUL WINKLER, as Executors of the Last Will and Testament of Bernarr Macfadden, deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioners, City Bank Farmers Trust Company, as Trustee under Deed of Trust made by Bernarr Macfadden, dated April 7, 1932, for the benefit of Mary Macfadden, and Mary Macfadden, pray that a writ of certiorari issue to review the order and judgment of the Court of Appeals of the State of New York entered on March 28, 1963 and the order and judgment on remittitur of the Court of Appeals of the State of New York, dated and entered on April 10, 1963 and May 27, 1963 respectively in the office of

the Clerk of the Supreme Court of the State of New York, County of New York.

Opinions Below

The opinion of the New York Supreme Court (R. 399-403)* is reported in 25 Misc. 2d 125, 198 N.Y. Supp. 2d 782. The opinions of the majority and minority of the Appellate Division of the New York Supreme Court (R. 431-446) are reported in 13 A. D. 2d 395, 216 N.Y. Supp. 2d 215, and are printed in Appendix A, infra, pp. A. 1-12. There was no opinion rendered by the Court of Appeals. The judgment entered on the order of the Appellate Division, which judgment is printed in Appendix A, pp. A. 13-14, was affirmed by the Court of Appeals and said order of affirmance is printed in Appendix A, pp. A. 15-16. Petitioners' motion to amend the remittitur of the Court of Appeals was denied by that Court on May 2, 1963,** and the order denying said motion is printed in Appendix A, p. A. 17. The judgment on remittitur of the Court of Appeals is printed in Appendix A, p. A. 18. The opinion of the New Jersey Superior Court in the case entitled *Mary Macfadden* vs. *Bernarr Macfadden, et al.*, is reported in 46 N.J. Super. 242, 134 Atl. 2d 531, and

* All references to the Record herein are by page numbers.

** The only conceivable reason for the denial must be that the constitutional question appears so clearly from the record that an amendment to the remittitur was unnecessary; otherwise the denial is inexplicable. The constitutional question decisive of the appeal was clearly raised in the pleadings, and was passed upon and determined by the Special Term, and the Appellate Division, both in the majority and in the dissenting opinions. This Court will itself determine the existence of such constitutional question. *Allied Stores* v. *Bowers*, 358 U.S. 522 (1958); *Erie* v. *Thompson*, 337 U.S. 163 (1949).

the opinion of the Appellate Division of said Court (R. 411-419), printed in Appendix A, p. 20, is reported in 49 N.J. Super. 356, 139 Atl. 2d 774, cert. den. 27 N.J. 155, 141 Atl. 2d 828.

Jurisdiction

The order of the Court of Appeals of the State of New York, the highest court of the State, was entered on March 28, 1963 and the order and judgment on remittitur of said Court were entered on April 10, 1963 and May 27, 1963, respectively. No application has been made to the Court of Appeals for a rehearing and there has been no application made for an extension of time within which to petition for certiorari.

Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., §1257(3) since a right is claimed under the Constitution of the United States.

Question Presented

Does Article IV, Sec. 1 of the Constitution of the United States require the courts of the State of New York to give full faith and credit to a final judgment of the New Jersey Superior Court piercing the corporate entity of Bernarr Macfadden Foundation, Inc., and holding the Foundation liable for the obligations of Bernarr Macfadden under a separation agreement entered into on April 7, 1932 with his wife, Mary Macfadden?

Constitutional Provision and Statute Involved

The pertinent constitutional provision, Article IV, Sec. 1 and Stat. 28 U.S.C. §1738, are set out in Appendix B, infra, p. B 1.

Statement

This action was instituted in July, 1956 in the New York Supreme Court by City Bank Farmers Trust Company, as Trustee under Deed of Trust made by Bernarr Macfadden, dated April 7, 1932, for the benefit of Mary Macfadden (R. 13, et seq.) for the judicial settlement of its account as Trustee, and other relief, including a judgment against Bernarr Macfadden Foundation, Inc., for deficiencies in income from said trust fund which Bernarr Macfadden had agreed to pay (R. 43).

On April 7, 1932, Mary Macfadden and her husband, Bernarr Macfadden entered into a separation agreement and implementing trust agreement under which he obligated himself to provide for her support and maintenance for her lifetime (R. 30-46). By said agreements Bernarr Macfadden undertook to provide his wife with (a) income from the trust "for her sole use and benefit," and (b) a home for her lifetime (R. 38, 44). The obligation to provide a home could be fulfilled by permitting Mrs. Macfadden and the children of the marriage to use the parties' former home in Englewood, New Jersey, and she has continued to reside there. The cost of the maintenance of the property was to be borne 3/10ths out of the guaranteed trust income and 7/10ths by Mr.

Macfadden. He specifically agreed that, should the income from said trust at any time be less than the sum of $15,000 annually, he would be personally liable to pay the difference between the amount of such income and said sum of $15,000 to the trustee, to be paid over to the life beneficiary as income (R. 43). The provisions for the home maintenance and for the personal income are part and parcel of the same obligation. In an action brought in 1933 by Mary Macfadden against her husband in the Chancery Court of New Jersey to enforce the terms of the separation agreement and trust a final decree was entered on June 24, 1934 holding Bernarr Macfadden personally liable on the obligations for home maintenance and for personal income (R. 381-383).*

In 1931 Bernarr Macfadden had caused the Bernarr MacFadden Foundation to be formed and transferred to it substantially all of his assets (R. 214). In 1935 the Foundation, then the record titleholder of the Englewood property, sought to sell such residence. Mrs. Macfadden thereupon brought action against Bernarr Macfadden, the Foundation, and others, in the Superior Court of New Jersey, Chancery Division, to enforce her rights under the separation agreement of April 7, 1932 and prevent the sale. During the pendency of such action Bernarr Macfadden died, insolvent (R. 22), and his executors were thereafter substituted in his place.

In the action Mary Macfadden contended, among other things, that the Foundation was, in reality,

* This decree is extensively commented upon in the opinion of the Appellate Division of the New Jersey Superior Court, supra; 49 N.J. Super. 356 (R. 414-418).

Bernarr Macfadden's personal holding company, his alter ego, and that its corporate entity should be disregarded (R. 264-265).

The issues raised for adjudication by such contention were set forth in the pre-trial order of the New Jersey Court as follows:

> "(b) Was and is the Foundation the alter ego of said Macfadden?
>
> * * * *
>
> (d) Is the Foundation bound to perform the obligation of Bernarr Macfadden under the April 7, 1932 agreement?" (R. 327)

By final judgment of the New Jersey Superior Court, Chancery Division, entered on September 28, 1957 (R. 340-351), it was determined that Mrs. Macfadden was entitled to the undisturbed use, occupancy and possession of the Englewood property so long as she should live, by virtue of and pursuant to the separation agreement (R. 341), and that the agreement imposed upon the Foundation the obligation to pay 7/10ths of the maintenance costs of said premises for so long as she should continue to use, occupy and possess the same (R. 344). This was an affirmative determination of the issues set forth in the pre-trial order and squarely held that the Foundation was the alter ego of Bernarr Macfadden and bound to perform such obligation of his under the April 7, 1932 agreement. The judgment of the New Jersey Superior Court was affirmed by the New Jersey Appellate Division (R. 353) and certiorari was denied by the New Jersey Supreme Court (R. 355).

The Appellate Division of the New Jersey Superior Court affirmed the lower Court judgment for the reasons given in the opinion below as "supplemented" (R. 412) by its opinion. In so supplementing the opinion below, the Court stated:

> "Defendant also makes some comment concerning the absence of fraud in connection with the piercing of the corporate veil of Bernarr Macfadden Foundation, Inc.
>
> "In Irving Investment Corp. v. Gordon, 3 N.J. 217, 223, 69 A. 2d 725, 728 (1949), the court said:
>
> > 'It is where the corporate form is used as a shield behind which injustice is sought to be done by those who have the control of it that equity penetrates the veil.'
>
> "That statement connotes merely that there must be equitable fraud present to permit of such action. Fraud, in the sense of a court of equity, includes all acts, omissions or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. Howard v. West Jersey & S.S.R. Co., 102 N.J. Eq. 517, 141 A. 755 (Ch. 1928), affirmed 104 N.J. Eq. 201, 144 A. 919 (E. & A. 1929); Riverside Trust Co. v. Collins, 114 N.J. Eq. 157, 168 A. 377 (E. & A. 1933). Plainly, the facts sustain the conclusion that the use of the corporate form is here fraudulent in the above sense." (R. 413-414).

The Trustee in the New York action having sued for income deficiencies under the provisions of the separation agreement, the constitutional issue as to

whether the New York Court was required to give full faith and credit to the determination of the New Jersey Court was explicitly raised by the pleadings. At the opening of the trial City Bank Farmers Trust Company, as Trustee, and Mary Macfadden amended their respective replies, with the consent of the attorney for the defendants (R. 104), to plead that the final judgment of the New Jersey Superior Court, Chancery Division, determining that Bernarr Macfadden Foundation, Inc., is the alter ego of Bernarr Macfadden, is entitled to full faith and credit (R. 101-104).

At the conclusion of the trial all of the issues in the action were resolved on consent, except the issue as to the liability of the Foundation for Bernarr Macfadden's obligation to meet such income deficiencies (R. 9-12).

On the single issue not resolved by consent, the Special Term of the New York Supreme Court held for the plaintiff on two grounds. The first (not claimed to be before this Court for consideration) was that the transfer of assets by Bernarr Macfadden to the Foundation was a fraudulent conveyance; and the second was that the court was required to give full faith and credit to the New Jersey judgment that the Foundation was the alter ego of Bernarr Macfadden and responsible for his obligations under the separation agreement. In his opinion at Special Term, Edgar J. Nathan, Jr., Justice, passed on the issue in the following language:

> "* * * this court holds that the final judgment rendered upon the merits by the New Jersey court hereinabove referred to is binding upon the

parties in this proceeding, and that this court is bound to give full faith and credit to said judgment in settling this account." (R. 402)

Upon appeal to the Appellate Division of the New York Supreme Court, the court, with two Justices dissenting, modified the judgment of Special Term by deleting therefrom the judgment in favor of the plaintiff against the Foundation, and reversed the findings that the court was bound by the prior adjudication that the Foundation was the alter ego of Bernarr Macfadden and therefore responsible for his obligations under the separation agreement. It made new findings to the contrary (R. 424-428).

The dissenting opinion, in accord with the Trial Justice, concluded that the New Jersey judgment was entitled to full faith and credit as follows:

> "Whether we would have concluded as did the New Jersey tribunal that the Foundation was the alter ego of Macfadden, or whether on this record there is sufficient to warrant a *de novo* determination of that issue, and I entertain grave doubt that there is, is of little moment. Under the full faith and credit clause of the Constitution (U.S. Const., Art. IV, §1) the New Jersey judgment is entitled to full recognition and effect since the conclusions reached were not offensive to our public policy or contrary to our laws. Thus we have no right, nor does reason exist in equity, to go behind the judgment to examine the bases for the determination. (cf. Milliken v. Meyer, 311 U.S. 457, 462)" (R. 446)

The petitioners herein then appealed to the New York Court of Appeals on the ground that there was

directly involved the construction of the Constitution of the United States, since the judgment of the New Jersey Superior Court is entitled to full faith and credit (R. 421).

Reasons for Granting the Writ

The petitioners have been denied a substantial federal right, i.e., the right to have full faith and credit given to the judgment of the New Jersey Court. The Appellate Division of the New Jersey Superior Court pierced the corporate entity of the Foundation and held that it was the alter ego of Bernarr Macfadden. Had it not done so, it could not have sustained the judgment of the New Jersey lower court which had in its decretal paragraphs (R. 346-350) ordered the Foundation to pay 7/10ths of all taxes and repairs on the premises at Englewood occupied by Mary Macfadden.

Had the present action been brought in New Jersey, the New Jersey Courts would have held that the defendants were precluded, by the doctrine of *res judicata* or collateral estoppel, from relitigating the alter ego issue. The New Jersey rule consistently applied, is cogently stated in *Petition of Gardiner*, 67 N.J. Super. 435, 170 Atl. 2d 820, 827 as follows:

> "Petitioner first seeks to avoid the effect of the prior judgment on the ground that the subject matter of the two respective proceedings differs. However, this is not, properly speaking, a case of different subject matter, but of different causes of action. Such a difference is immaterial if a postulate of law essential to the success of the party in the later proceeding has been distinctly

> put in issue and adjudicated *contra* in the earlier, particularly where, as here, the subject matter in both proceedings arises out of the same transaction."

The holding that the Foundation was the alter ego of Bernarr Macfadden was in an action between the same parties, i.e., the petitioner, Mary Macfadden, and the respondent, Bernarr Macfadden Foundation, and although it involved a different cause of action, both causes arose out of the identical separation agreement.

In *O'Shea v. Chrysler Corporation*, 206 F. Supp. 601, an action brought in the Federal District Court in New Jersey by a motorist against a manufacturer for property damages and personal injuries alleged to have resulted from a defective steering mechanism, where there had been a prior New York judgment dismissing the defendant's claim against the manufacturer, when asserted by the defendant in a third party complaint, the District Judge cited a number of New Jersey cases to support the conclusion (p. 606) that:

> "However, regardless of whether there is an identity of causes of action and hence, whether the principle of res judicata or collateral estoppel applies, the issues now sought to be litigated have once been litigated and determined between the parties before a court of competent jurisdiction, and this is sufficient under either theory to raise a bar to the plaintiff's present action."

This Court has adhered to the classic statement of the rule of *res judicata* in *Southern Pacific R. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897), quoted by

Mr. Justice Douglas in *United States* v. *Munsingwear*, 340 U.S. 36 (1950) at p. 38:

> "'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'".

New York law in no way differs from New Jersey law where an issue previously determined was essential to a prior judgment and would be dispositive of the cause of action involved. *Israel* v. *Wood Dolson Co.*, 1 N.Y. 2d 116.

The New Jersey court determined that the Foundation was the alter ego of Bernarr Macfadden, which issue could not have been relitigated by the respondents in New Jersey. Accordingly, the New York Courts were bound to give full faith and credit to the New Jersey judgment. *Morris* v. *Jones*, 329 U.S. 545 (1946) (rehearing denied 330 U.S. 854), where, at p. 547, Mr. Justice Douglas stated:

> "The Full Faith and Credit Clause and the statute which implements it (R.S. §905, 28 U.S.C. §687) require the judgments of the courts of one State to be given the same faith and credit in another State as they have by law or usage in the courts of the State rendering them.".

In failing to hold that such issue had been determined by the New Jersey Courts and could not be so

relitigated, the New York Courts disregarded the constitutional mandate requiring the giving of full faith and credit, contrary to the decisions of this Court in *Milliken* v. *Meyer*, 311 U.S. 457 (1940); *Roche* v. *McDonald*, 275 U.S. 449 (1928) and *Fauntleroy* v. *Lum*, 210 U.S. 230 (1908).

The affirmance by the New York Court of Appeals of the judgment of the Appellate Division striking out the recovery against the Foundation renders sterile the New Jersey decree, for absent trust income Mrs. Macfadden cannot defray her 3/10ths share of the cost of the home. The Estate of Bernarr Macfadden, which was held liable for the income deficiencies, is insolvent (R. 22). Consequently the judgment obtained against the executors is worthless. Apart from the manifest injustice of such a result to Mrs. Macfadden it is patent that the court below has decided a substantial federal constitutional question in a way in conflict with applicable decisions of this Court. The right to be secure in the judgment of a court of a sister State is manifestly one of fundamental public importance.

The petitioners therefore pray that a writ of certiorari issue to the Court of Appeals of the State of New York.

Respectfully submitted.

MAURICE V. SELIGSON
285 Madison Avenue
New York, N.Y.
Attorney for Petitioners

TYRK, MARSH, OUCHTERLONEY, KELLY & HOARE
666 Fifth Avenue
New York, N.Y.
of Counsel

APPENDIX A

Opinions of Appellate Division of the Supreme Court of the State of New York

SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

MAY 1961

BERNARD BOTEIN,
P.J.

BENJAMIN J. RABIN,
JAMES B. M. MCNALLY,
HAROLD A. STEVENS,
SAMUEL W. EAGER,
JJ.

CITY BANK FARMERS TRUST COMPANY, as Trustee under Deed of Trust made by Bernarr Macfadden, dated April 7, 1932, for the benefit of Mary Macfadden,
Plaintiff-Respondent,

—against—

MARY MACFADDEN,
Defendant-Respondent,

and

BERNARR MACFADDEN FOUNDATION, INC., and EDWARD F. BODIN and PAUL WINKLER, as Executors of the Last Will and Testament of Bernarr Macfadden, deceased,
Defendants-Appellants.

Appeal from interlocutory judgment of the Supreme Court at a Special Term (Nathan, *J.*), entered June 10,

1960, in New York County, in an action for the judicial settlement of the account of plaintiff as trustee under a deed of trust; excepting from the appeal, however, decretal paragraphs numbered 1 and 3.

Edward N. Costikyan of counsel (John G. Simon with him on the brief; Paul, Weiss, Rifkind, Wharton & Garrison, attorneys) for appellants Bernarr Macfadden Foundation, Inc. and Edward F. Bodin and Paul Winkler as Executors.

Maurice V. Seligson of counsel for defendant-respondent Mary Macfadden.

Richard J. Turk, Jr. of counsel (Turk, Marsh, Occhiterfoney & Kelly, attorneys) for plaintiff-respondent City Bank Farmers Trust Company as trustee.

Eager, *J.*

This is an appeal by the defendants from the interlocutory judgment herein excepting such portion of the said judgment which consists of decretal paragraphs numbered "1" and "3" relating to the first and third causes of action and to the counterclaim of defendant Bernarr Macfadden Foundation, Inc. Therefore, the appeal by the defendants is from the judgment insofar as it is in favor of the plaintiff upon the second and fourth causes of action.

It appears that the judgment in favor of the plaintiff against the defendant executors of Bernarr Macfadden, deceased, upon the second cause of action, was rendered on consent of counsel given at the close of the trial. The judgment appealed from expressly recites that it is on consent of the defendants. It is clear that an appeal does not lie from a judgment entered on consent. Therefore, the appeal, insofar as it is an appeal from the judgment in favor of plaintiff and against the defendant

executors on the second cause of action should be dismissed, without costs. See 8 Carmody-Wait, §§21, 71, pp. 508, 548; also *Norton & Siegel, Inc.* v. *Nolan*, 276 N.Y., 392, 394.

There was an application by the defendant executors to the trial justice for an order to show cause to bring on a motion to be relieved of the consent to the judgment against them upon the second cause of action, and for a re-hearing and reconsideration upon the merits of the issues with respect to such cause of action. The trial justice, however, refused to sign the order to show cause and to entertain the application. No order was entered, and the merits of this application are not before this court.

The sole matter for consideration here upon the merits is the No. 4 decretal paragraph of the judgment providing for a recovery in favor of the plaintiff upon the fourth cause of action against the defendant Bernarr Macfadden Foundation, Inc. (hereinafter referred to as the "Foundation"). In fact, following the discussion and concessions at the close of the trial, it was concluded that the only issue in the action requiring determination by the court was the subject matter of said fourth cause, namely, the matter of the alleged liability of the Foundation for the obligations of Bernarr Macfadden under the 1932 separation agreement to pay, for the benefit of his wife any deficiency between the trust income and the sum of $15,000 yearly. The trial court has held the Foundation liable to pay such deficiency, and the question before this court is whether or not such holding is sustained by the record.

Some statement of the facts seems necessary before discussing and passing upon the questions involved. Bernarr Macfadden was the founder of a cult and an active promoter of the teachings of physical culture. It appears that Bernarr and Mary Macfadden were married in 1913 when she was 19 and he was 39 years of age. The marriage was apparently a happy one and the husband and wife worked

together and achieved success and a great fortune. In 1930, however, the parties were separated. In 1931, Bernarr turned over about $5,000,000 to the Foundation, which he had incorporated as a New York membership corporation. In 1932, he and his wife entered into a separation agreement, by the terms of which Bernarr agreed to establish a trust for his wife with income to her for life and to supply a home for the benefit of herself and children. It was further expressly provided therein that if the trust should not yield a minimum income of $15,000 per annum for the wife, he would pay the deficiency. An inter vivos trust as provided for in the separation agreement was duly set up. It appears, however, that in each of the fiscal years ending April 7, 1955, April 7, 1956, April 7, 1957, April 7, 1958 and April 7, 1959, the income from the trust to be paid to Mary was substantially less than $15,000 and that the total deficiency for the five years amounted to $24,104.32. As aforesaid, judgment has been entered on consent for this last mentioned sum, with interest, against the executors of Bernarr's estate; and by the fourth cause of action it is sought to recover judgment for said sum and interest against the Foundation.

By the provisions of the separation agreement, the obligation to pay the deficiency between the income from the trust set up for wife Mary and $15,000 per annum was made the personal obligation of Bernarr. The plaintiff-respondent trustee and the defendant-respondent Mary Macfadden sought in this action to hold the appellant Foundation for the deficiency for the five particular years on two theories, namely (1) that the transfers of funds and property by Bernarr in his lifetime to the Foundation were fraudulent as to the plaintiff generally and also as in violation of the provisions of Article 10 of the Debtor and Creditor Law; and (2) that the Foundation was nothing more than the alter ego of Bernarr and therefore responsible for his obligations. In support of their theories,

the respondents took the position that a certain judgment rendered in an action by Mary against the Foundation and the executors of Bernarr by the New Jersey Superior Court (affirmed by the New Jersey Appellate Division—see 46 N.J. Super. 242, 134 A. 2d 531, aff'd 49 N.J. Super. 356, 139 A. 2d 774) was *res judicata* on the issue of liability of the Foundation; and that, in any event, on the trial of the issue *de novo* herein, the liability of the Foundation was established.

This court, however, unanimously concludes that, independent of application of the doctrine of *res judicata*, the respondents have failed to establish that the transfers made by Bernarr to the Foundation were fraudulent as against Mary, as against creditors generally or as in violation of the provisions of Article 10 of the Debtor and Creditor Law. Also, this court unanimously concludes that the evidence before the court here, considered *de novo*, does not establish that the Foundation was the *alter ego* of Bernarr in the sense of making it responsible for his debts and obligations, including the obligation under the separation agreement to make up the deficit between the trust income and the $15,000 yearly to be paid to Mary.

Remaining only is the question of whether or not the issue as to the liability of the Foundation for the particular obligation of Bernarr was in fact determined by the judgment in favor of Mary in the New Jersey Superior Court action. The learned trial court concluded that the parties were bound by this judgment as "a prior adjudication that the Foundation is the *alter ego* of Bernarr Macfadden and is, therefore, responsible for his obligations under the separation agreement." Such conclusion is justified, however, only if this precise issue here was litigated and determined in the New Jersey Superior Court action. Unless this is so, the judgment here is not sustainable on basis that the New Jersey Superior Court judgment is *res judicata*.

The New Jersey Superior Court action had been brought solely to secure a determination of Mary's rights with respect to the home, situate in New Jersey, supplied by Bernarr, her husband. Although Bernarr had paid the purchase price therefor, the title to the property from time of acquistion in 1927 was held by him in the name of divers corporations over which he had control; and, in 1937, title was conveyed to the Foundation, also controlled by him. For some time, the corporations and the Foundation, though holding the legal title, recognized the outstanding interest of Mary in the property, and they paid the taxes and carrying charges. Finally, in 1954, the Foundation sought to take over this property which was occupied as a home by Mary and to sell it. Thereupon, she brought the action in the New Jersey Superior Court, and therein sought an adjudication that the Foundation held title to the same subject to her rights therein under the separation agreement and with the obligation on it to keep the property in repair and to pay the taxes thereon.

The judgment in the New Jersey Superior Court action determined that the title of the Foundation to the home property was subject to a life estate in Mary, as provided for by the separation agreement, and, further, that there was imposed upon the Foundation, or on its default, upon the executors of Bernarr, the obligation to keep the premises in repair and free of unpaid taxes, so long as Mary should use and occupy the same. Clearly, this judgment was not a judgment upon the same cause of action as is here involved. Any determination reached here would not have the effect of destroying or in any way limiting, the rights of Mary as established by the judgment of the New Jersey Superior Court. Therefore, under the "decisive test" applied by the decisions, such judgment is not *res judicata* as to the cause of action here against the Foundation. (See *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 308; also *Ripley* v. *Storer*, 309 N.Y. 506).

Under the circumstances, we are concerned here solely with that aspect of *res judicata* which is referred to as collateral estoppel. "* * *, where the subsequent action is based upon a different cause of action from that upon which the prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action. This is the doctrine of collateral estoppel." American Law Institute Restatement of the Law of Judgments, Section 68. See further, Harvard Law Review, Vol. LVI, No. 1; 50 C. J. S. Judgments, 593, 687; *Hollenbeck* v. *Aetna Casualty & Surety Co.*, 215 App. Div. 609, 611, aff'd 243 N. Y. 540.

The judgment in the prior New Jersey Superior Court action "stands as *res judicata* of whatever issues it decides between these parties." *Ripley* v. *Storer*, *supra*, p. 512. Where, however, the two causes of action are different, "[t]he estoppel is limited in such circumstances to the point actually determined." *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N.Y. 304, 307. The inquiry, therefore, is, was the issue before the court here actually litigated and determined by the judgment in the prior action. It is clear that "certainty as to the precise matters adjudicated is of the essence of the estoppel * * *". 2 Freeman on Judgments, Fifth Edition, Section 691, page 1460. See also, *Rudd* v. *Cornell*, 171 N. Y. 114.

To determine whether the precise issue was presented and litigated in the prior New Jersey action, we would look primarily to the pleadings, the pre-trial order, the opinion and decision and the judgment rendered and entered. An examination of the pleadings in the prior action, however, discloses no allegations tending to bring before the court the *alter ego* issue in the sense necessary to support plaintiff's case here. It is true that, in the pre-trial order, the

following issues were specified as raised by the pleadings, to wit: "(a) Were the corporations which held title of record to the Englewood home premises on April 7, 1932 until conveyance thereof to the Foundation organized and controlled by defendant Bernarr Macfadden? (b) Was and is the Foundation the alter ego of said Macfadden?" Such specification must, however, be viewed in the light of the allegations of the pleadings and the particular cause of action involved. They are to be construed as presenting the *alter ego* issue insofar as it had relation to the alleged rights of Mary in the home property and the alleged liability of the Foundation with respect to maintaining the same and the payment of taxes thereon. In this limited sense only was the issue presented.

We are reminded that a prior judgment or decision "'does not operate as an estoppel as to immaterial or unessential facts' but only as to those facts 'which have such a relation to the issue that their determination was necessary to the determination of that issue'. (*Stokes* v. *Stokes*, 155 N.Y. 581, 592)": *Mintzer* v. *Loeb, Rhoades & Co.*, 10 A. D. 2d 27, 30. The rule of *res judicata* "does not prevent the relitigation of a fact litigated and found in the earlier action if it was irrelevant to the issues therein and was not necessary to the final judgment." *Ripley* v. *Storer*, supra, p. 512. A determination of the alter ego issue in the New Jersey action was only necessary to the extent justifying a court of equity to hold the Foundation responsible for the obligations of Bernarr with respect to the home property carried in its name. Beyond that limited sense, a consideration of the *alter ego* issue was immaterial and unnecessary to a determination of the action.

In any event, it is clear from the pleadings, the pretrial order as a whole, the opinion of the trial court, the judgment, and the opinion of the Appellate Court that no adjudication was intended or made in the New Jersey action upon the question of whether or not the Foundation

was the *alter ego* of Bernarr in the sense necessary to support the respondents' alleged case here against the Foundation. In fact, the pre-trial order contained the incidental statement that "The question of support for Mary Macfadden under the said agreement (the separation agreement) is not involved in this litigation." Furthermore, statements in the opinion of the trial justice in the New Jersey action give clear indication that there was no general holding by the court there that the corporate entity of the Foundation was to be disregarded to the extent that the Foundation was to be considered as the *alter ego* of Bernarr. For instance, the trial justice, in the course of his opinion, (46 N.J. Super. 242, 134 A. 2d 531, 534) said: "If a fraudulent purpose or use of a non-pecuniary association or corporation is established, the power of a court of equity to pierce the corporate entity exists even though it has no stockholders and its formation ostensibly is in the public interest (citing cases). *However, unless such a fraudulent purpose or use is disclosed, there is no justification for attacking the corporate structure.*" Further on, he said, "According to the by-laws of the Foundation, Macfadden possessed ten votes while each of the other eight members held but one. No one other than Macfadden, so far as is disclosed by the testimony, contributed any funds or property to any of the various corporations. It is clear that these corporations were the creatures and pawns of Macfadden. Nevertheless, there is no testimony or evidence of fraudulent purpose or objective. The mere use of corporate entities as devices for the holding or transfer of title is not in itself fruadulent." (Italicizing added by court here.)

Thus, there was in the New Jersey action no finding of a "fraudulent purpose or objective" essential to support a determination having the effect of disregarding the existence of the Foundation as a separate and distinct entity. Clearly, such a finding would be necessary to saddle

this membership corporation as the *alter ego* of Bernarr with responsibility for his personal debts and obligations, including his obligation to Mary under the separation agreement.

To treat a corporation as the mere *alter ego* of a stockholder or member and thus destroy its immunity from liability for his debts or personal obligations is to disregard its existence as a separate legal entity. The end result thereof is the taking of corporate assets and applying them contrary to the corporate purposes. So treating a corporation and its assets is distinctly contrary to the underlying theory of the corporate set-up. In fact, a corporation may properly be organized and conducted by a person for the avowed purpose of maintaining it as a separate entity free from responsibility for his debts. *Bartle* v. *Home Owners Cooperative*, 309 N.Y. 103. Consequently, to hold this membership corporation liable for the obligations of a member, albeit the controlling member, as his mere *alter ego*, there would be required a finding that the corporate form existed as a mere subterfuge and was used by him for a purpose which was fraudulent, illegal or contrary to public policy. (See 11 N.Y. Jur., Corporations, §§10-13; 18 C. J. S. Corporations, §§1, 4-7; Fletcher, Cyclopedia Corporations, Vol. 1, Chapter 2; *Bartle* v. *Home Owners Cooperative*, *supra*. Cf. *Warner Bros. Theatres* v. *Cooper Foundation*, 189 F. 2d 825. Clearly, there was no such finding by the New Jersey court. In fact, the finding was to the contrary.

In the opinion of the Appellate Division of the New Jersey Superior Court, affirming the judgment of the court below in Mary's action, there is the general statement that (49 N. J. Super. 356, 139 A. 2d 774, 776) "the facts sustain the conclusion that the use of the corporate form is here fraudulent in the * * * sense" justifying relief by a court of equity. Such statement, however, is to be viewed in the light of the particular issues before the court. "The effect of a decree as an adjudication

conclusive upon the parties, is not to be determined by isolated passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted, and which it was intended to decide. *Vicksburg* v. *Henson*, 231 U.S. 259, 272, 273; *United Shoe Mach. Co.* v. *United States*, 258 U. S. 451, 460." *Oklahoma* v. *Texas*, 272 U. S. 21, 42-43.

The conclusion of the Appellate Court that the evidence sustained the finding that the corporate form "is here fraudulent" in a sense recognized by a court of equity, was reached solely for the purpose of sustaining the right of Mary to a decree of a court of equity which would give her full relief with respect to the home property held by Bernarr in the name of the Foundation. The conclusion does not support a broad determination that the Foundation is liable for obligations of Bernarr unconnected with the home property. To give it such effect, on theory of *res judicata*, would operate to broaden the findings and judgment in the New Jersey action to embrace matters not in issue therein.

The burden of proof was upon the respondents to sustain their plea of res judicata to support a recovery against the Foundation on the Fourth cause of action. The burden was upon them "to show clearly that the question in issue in this case was litigated and determined in the former action." *Rudd* v. *Cornell*, supra, pp. 114, 127. And, if there be any uncertainty, its prior judgment is not conclusive. *Bell* v. *Merrifield*, 109 N.Y. 202; *Luman* v. *Billy Rose's Exposition Spectacles*, 267 App. Div. 532. "It is incumbent on a party claiming an estoppel to make out a clear case, and it cannot be sustained by doubtful inferences, or where the record is capable of a construction consistent with the subsequent claim." *Carter* v. *Beckwith*, 128 N.Y. 312, 323. Here, the respondents failed to establish their plea of estoppel by prior judgment.

In view of the foregoing, the judgment should be modified, on the facts and on the law, without costs, to delete the decretal paragraph thereof numbered "4" providing

for judgment in favor of plaintiff against the Bernarr Macfadden Foundation, Inc. in the total sum of $28,632.92. Findings of facts inconsistent herewith are reversed and new findings are made as indicated herein and as necessary to support the determination of this court.

All concur except McNally and Stevens, *JJ.*, who dissent in part in opinion by Stevens, *J.*

STEVENS, *J.* (dissenting in part):

I dissent in part and vote to affirm as to the fourth cause of action appealed from under the doctrine of *res judicata*. Examination of the record reveals that in the earlier litigation the courts of New Jersey had jurisdiction of the parties and of the subject matter. The judgment was responsive to the pleadings and to the issues raised. (*Macfadden* v. *Macfadden*, et al., 46 N.J. Super. 356, 139 A. 242, 134 A. 2d 531, aff'd 49 N. J. Super. 2d 774). There is no reason to permit a retrial here of issues there adjudicated or which might have been litigated in such action. *Israel* v. *Wood Dolson Co.*, 1 N.Y. 2d 116. Whether we would have concluded as did the New Jersey tribunal that the Foundation was the *alter ego* of Macfadden, or whether on this record there is sufficient to warrant a *de novo* determination of that issue, and I entertain grave doubt that there is, is of little moment. Under the full faith and credit clause of the Constitution (U. S. Const., Art. IV, § 1) the New Jersey judgment is entitled to full recognition and effect since the conclusions reached were not offensive to our public policy or contrary to our laws. Thus we have no right, nor does reason exist in equity, to go behind the judgment to examine the bases for the determination. Cf. *Milliken* v. *Meyer*, 311 U. S. 457, 462.

McNally, *J.* concurs.

Judgment Entered on Order Dated June 30, 1961 of Appellate Division of the Supreme Court of the State of New York

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 95-1957

CITY BANK FARMERS TRUST COMPANY, as Trustee under Deed of Trust made by Bernarr Macfadden, dated April 7, 1932, for the benefit of Mary Macfadden,
Plaintiff-Respondent,

—against—

MARY MACFADDEN,
Defendant-Respondent,

and

BERNARR MACFADDEN FOUNDATION, INC. and EDWARD F. BODIN and PAUL WINKLER, as Executors of the Last Will and Testament of Bernarr Macfadden, deceased,
Defendants-Appellants.

JUDGMENT ENTERED ON ORDER OF APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

Defendants-appellants Bernarr Macfadden Foundation, Inc., Edward F. Bodin and Paul Winkler having appealed to the Appellate Division of the Supreme Court, First Judicial Department, from a judgment, except for decretal paragraphs numbered "1" and "3" thereof, of the Supreme Court of New York County, entered June 16, 1960, adjudging defendants-appellants liable in favor of plaintiff in

Judgment Entered on Order Dated June 30, 1961 of Appellate Division of the Supreme Court of the State of New York

the amount of $24,104.32, together with interest thereon in the amount of $4,528.60, making in all the sum of $28,632.92, and for costs in the amount of $150.00, and said Appellate Division having heard the said appeal and, by an order entered in the office of the clerk of the said Appellate Division on the 30th day of June, 1961, modified the said judgment by deleting therefrom the decretal paragraph numbered "4" providing for judgment in favor of plaintiff against the Bernarr Macfadden Foundation, Inc. in the total sum of $28,632.92, and having affirmed the said judgment as so modified,

Now, on motion of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for defendants-appellants Bernarr Macfadden Foundation, Inc. and Edward F. Bodin and Paul Winkler, it is

Adjudged that the said judgment of June 10, 1960, be and the same hereby is modified on the law and on the facts by deleting therefrom the decretal paragraph numbered "4" providing for judgment in favor of plaintiff against the Bernarr Macfadden Foundation, Inc. in the total sum of $28,632.92, and as so modified the said judgment so far as appealed from is affirmed, without costs.

Dated:
1961 Aug. 3

James McGuire
Clerk

Filed
Aug 3 1961
New York
Co Clerk's Office

Order of Affirmance of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of March in the year of our Lord one thousand nine hundred and sixty-three, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

Remittitur March 28, 1963.

No. 319

CITY BANK FARMERS TRUST COMPANY, as Trustee &c.,
Plaintiff-Appellant,

vs.

MARY MACFADDEN,
Defendant-Appellant,

BARNARD MACFADDEN FOUNDATION, INC., & ors., &c.,
Defendants-Respondents.

BE IT REMEMBERED, That on the 24th day of August in the year of our Lord one thousand nine hundred and sixty-two City Bank Farmers Trust Company, as Trustee &c., the plaintiff-appellant, and Mary Macfadden, the defendant-appellant in this cause, came here unto the Court of Appeals, by Turk, Marsh, Ouchterloney & Kelly, and

Maurice V. Seligson, their respective attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Bernarr Macfadden Foundation, Inc., & ors., &c., the defendants-respondents in said cause, afterwards appeared in said Court of Appeals by Paul, Weiss, Rifkind, Wharton & Garrison, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Maurice V. Seligson, of counsel for the appellants, and by Mr. Edward N. Costikyan, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals of the
State of New York

(Seal)

Order Denying Motion to Amend Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Second day of May A.D. 1963.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 364

CITY BANK FARMERS TRUST COMPANY, as Trustee, &c.,

Plaintiff-Appellant,

vs.

MARY MACFADDEN,

Defendant-Appellant,

BERNARR MACFADDEN FOUNDATION, INC., & ors., &c.,

Defendants-Respondents.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the plaintiff-appellant and the defendant-appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

(Seal)

GEARON KIMBALL
Deputy Clerk

Judgment on Remittitur of the New York Court of Appeals

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Index No. 95/1957

CITY BANK FARMERS TRUST COMPANY, as Trustee under Deed of Trust made by Bernarr Macfadden, dated April 7, 1932, for the benefit of Mary Macfadden, 22 William Street, New York City,

Plaintiff-Appellant,

—against—

MARY MACFADDEN, Englewood, New Jersey,

Defendant-Appellant,

and

BERNARR MACFADDEN FOUNDATION, INC., and EDWARD F. BODIX and PAUL WINKLER, as Executors of the Last Will and Testament of Bernarr Macfadden, deceased, 24 West 40th Street, New York City,

Defendants-Respondents.

JUDGMENT ON REMITTITUR OF THE COURT OF APPEALS

The above-named plaintiff-appellant and defendant-appellant having appealed to the Court of Appeals of the State of New York from so much of the judgment of modification and affirmance of this Court, entered upon the order of the Appellate Division of the Supreme Court, First Department, in the Office of the Clerk of the County of New York, on the 3rd day of August, 1964, as modified the judgment adjudging defendants-respondents liable in favor of plaintiff-appellant in the amount of $24,104.32,

Judgment on Remittitur of the New York Court of Appeals

together with interest thereon, in the sum of $28,632.92, and for costs in the amount of $150.00, heretofore entered herein in the Office of the said Clerk on the 10th day of June, 1960, by deleting therefrom the decretal paragraph numbered "4" providing for judgment in favor of plaintiff-appellant against the Bernarr Macfadden Foundation, Inc. in the total sum of $28,632.92; and the said appeal having been duly argued at the Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudged that the said judgment so appealed from be affirmed, with costs, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court, there to be proceeded upon according to law; and the remittitur from the said Court of Appeals having been filed herein, and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

NOW, on motion of PAUL, WEISS, RIFKIND, WHARTON & GARRISON, attorneys for defendants-respondents, it is hereby

ADJUDGED that the said judgment so appealed from be and the same hereby is affirmed; and it is further

ADJUDGED that the defendants-respondents recover of the plaintiff-appellant and the defendant-appellant the sum of $346.90 costs as taxed, and that the defendants-respondents have execution therefor.

Dated: New York, New York
May 24, 1963

s JAMES McGUIRRIN
Clerk

Opinion of the Superior Court of New Jersey, Appellate Division

No. A-58

(Reported in 49 N. J. Super. Ct. 356)

MARY MACFADDEN,

Plaintiff-Respondent,

v.

BERNARR MACFADDEN, L. ARTHUR ST. PHILLIP and BRAUNDA M. ST. PHILLIP, his wife,

Defendants,

and

BERNARR MACFADDEN FOUNDATION, INC., a Membership corporation organized pursuant to the Membership Corporation Law of New York,

Defendant-Appellant,

and

EDWARD F. BODINE and PAUL WINKLER, Executors of the Last Will and Testament of Bernarr Macfadden, deceased,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

Argued March 10, 1958

Decided March 25, 1958

Before Judges PRICE, SCHETTINO and HANEMAN.

PER CURIAM.

The judgment is affirmed for the reasons expressed in the opinion of Judge Freund in the court below. 46 N. J. Super. 242, 134 A. 2d 531 (Ch. Div. 1957), supplemented however, as follows:

Defendant argues that the trial judge erroneously labeled the action as one for specific performance. It must be remembered that it is from the judgment, and not the opinion, that appeal is taken. R. R. 2:2-1. *Hughes* v. *Eisner*, 8 N.J. 228, 84 A. 2d 626 (1951). The written conclusions or opinion of a court do not have the effect of a judgment. From them no appeal will lie. "It is only what a court adjudicates, not what it says in an opinion, that has any direct legal effect." *Suburban Department Stores* v. *City of East Orange*, 47 N.J. Super. 472, 479, 136 A. 2d 280, 284 (App. Div. 1957). A judgment admittedly, cannot be founded on a theory not appearing or raised in the proceedings or pretrial order. *Lertch* v. *McLean*, 18 N.J. 68, 74, 112 A. 2d 735 (1955).

There are 13 issues detailed in the pretrial order. None of the issues is designated by any recognized nomenclature for types of equitable actions. An examination of the issues results in the conclusion that what the plaintiff actually sought was specific performance, together with auxiliary injunctive relief. The statement of the trial judge that the action was one for specific performance is consistent with the stated issues and the theory upon which the case was tried.

Even though the issue of specific performance was not specifically raised by the pleadings or the pretrial order, where, as here, the matter was tried without the objection of the parties on that issue, it shall be treated in all respects as if it had been raised in the pleadings and pretrial order. Ordinary procedure would call for an amendment of the pleadings and the pretrial order in the event an issue not raised in the pleadings and pretrial order was tried by consent or without objection. In

the light of the fact that this matter was tried without objection on the issue of specific performance, defendant may not now be heard to complain. R. R. 4:15-2; *Colozzi v. Berko, Inc.*, 17 N.J. 194, 203, 110 A. 2d 545 (1955); 2 Schnitzer & Wildstein, N.J. Rules Serv., A IV-386.

Defendant also makes some comment concerning the absence of fraud in connection with the piercing of the corporate veil of Bernarr Macfadden Foundation, Inc.

In *Irving Investment Corp. v. Gordon*, 3 N.J. 217, 223, 69 A. 2d 725, 728 (1949), the court said:

> "It is where the corporate form is used as a shield behind which injustice is sought to be done by those who have the control of it that equity penetrates the veil."

That statement connotes merely that there must be equitable fraud present to permit of such action. Fraud, in the sense of a court of equity, includes all acts, omissions or concealments which involve a breach of a legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. *Howard v. West Jersey & S. S. R. Co.*, 102 N.J. Eq. 517, 141 A. 755 (Ch. 1928), affirmed 104 N.J.Eq. 201, 144 A. 919 (E. & A. 1929); *Riverside Trust Co. v. Collin*, 114 N.J.Eq. 157, 168 A. 377 (E. & A. 1933). Plainly, the facts sustain the conclusion that the use of the corporate form is here fraudulent in the above sense.

As to defendant's argument that it should not be liable for repairs to the premises involved, it must be observed that from 1932 to 1953 the cost of repairs had been assumed by it. This action constituted a contemporary construction of the agreement of April 7, 1932.

Where the parties to a contract have given it a practical construction by their conduct, such construction is entitled to great if not controlling weight in determining its interpretation. *Kingston Trap Rock Co. v. Eastern*

Engineering Co., 132 N. J. L. 254, 39 A. 2d 422 (E. & A. 1944); *Washington Construction Co., Inc.* v. *Spinella*, 13 N. J. Super. 139, 80 A. 2d 318 (App. Div. 1951), affirmed 8 N. J. 212, 84 A. 2d 617, 28 A. L. R. 2d 863 (1951).

By a bill of complaint filed on May 9, 1933 in the then Court of Chancery in an action between Mary Macfadden and Bernarr Macfadden, plaintiff prayed for the following relief, *inter alia*:

> "2. That an account may be taken of the sums of money expended by defendant in the cost of upkeep, expense, maintenance and support, including rent, 'and or' carrying charges of the home provided by the defendant for the complainant and the respective proportionate amounts of such expenditures which should have been paid by the complainant and defendant determined, and a readjustment be made, and the defendant ordered to account for and pay to the said trustee for the benefit of complainant all moneys improperly charged against her.
>
> "3. That the said Bernarr Macfadden may be compelled by the decree of this court specifically to perform the said agreement with complainant, and to pay to the said trustee for the benefit of the complainant or to the complainant direct, the moneys by said agreement due the complainant, with interest from the time they ought to have been paid."

A consent final decree was entered on June 20, 1934 which contained the following provision:

> "Ordered, Adjudged and Decreed, by the Honorable Luther A. Campbell, Chancellor of the State of New Jersey, that a certain agreement heretofore made between the said complainant, Mary Macfadden, and the said defendant, Bernarr Macfadden, and dated April 7, 1932, a true copy of which is attached to the bill of complaint herein, be specifically performed and carried out by the said Bernarr Macfadden, in

accordance with its several terms, up to the date of this decree; and it is further

"Ordered, Adjudged and Decreed that the said Bernarr Macfadden, within—15—days from the date hereof, do pay to the said complainant, Mary Macfadden, or her solicitors, the sum of $13,500.00, the amount agreed to be due by him to her as of the date hereof, pursuant to the terms of the agreement between them heretofore referred to and dated April 7, 1932; * * *"

The statement of Judge Speakman, in *Public Service Elec. & Gas Co.* v. *Waldroup*, 38 N. J. Super. 419, 425, 119 A. 2d 172, 175 (App. Div. 1955) is apposite. There the court said:

"* * * It is a fundamental rule that facts and questions in issue in an action and there admitted or judicially determined are conclusively settled by a judgment entered therein, and such facts or questions become *res judicata* in all subsequent litigation between the same parties and their privies. Hancock v. Singer Mfg. Co., 62 N. J. L. 289, 41 A. 846, 42 L. R. A. 852 (E. & A. 1898); Middlesex Concrete Products & Excavating Corp. v. Borough of Carteret, 35 N. J. Super. 226, 113 A. 2d 821 (App. Div. 1955) as to a related aspect of the same case, see 36 N. J. Super. 400, 116 A. 2d 200 (App. Div. 1955), certification denied 19 N. J. 383, 117 A. 2d 323 (1955), and 19 N. J. 384, 117 A. 2d 323 (1955); 30 Am. Jur., Judgments, sec. 178; 50 C. J. S. Judgments §686. This is known as the doctrine of collateral estoppel or estoppel by judgment and is to be distinguished from the doctrine of *res judicata*, which is that in any action on a cause previously litigated by the same parties or their privies, a general judgment in the prior action is considered a finding against the

party affected on all grounds that were or could have been raised therein. Kelley v. Curtiss, 16 N. J. 265, 108 A. 2d 431 (1954); Middlesex Concrete Products & Excavating Corp. v. Borough of Carteret, *supra*, 30 Am. Jur., Judgments, secs. 161-177, and cases cited therein.

"A judgment by consent is presumed to be entered in the light of all the existing circumstances of the litigation. Although such a judgment is considered a contract of the parties acknowledged and sanctioned by the court, it is regarded as an adverse judgment and is conclusive and effective as an estoppel to the same extent as though entered after a full trial. Fidelity Union Trust Co. v. Union Cemetery Association, 136 N. J. Eq. 15, 40 A. 2d 205 (Ch. 1944), affirmed *per curiam*, 137 N. J. Eq. 455, 45 A. 2d 670 (E. & A. 1946) and 137 N. J. Eq. 456, 45 A. 2d 698 (E. & A. 1946); Middlesex Concrete Products & Excavating Corp. v. Borough of Carteret, *supra*; 31 Am. Jur., Judgments, sec. 458; 50 Am. Jur., Judgments, sec. 705.

"* * * the authorities previously cited herein, as well as innumerable others, hold either expressly or by necessary implication that a fact or question has been litigated if it has been put in issue by the pleadings and a judgment by consent has been entered thereon. Such a judgment constitutes an adjudication on the merits."

The question of the liability of Bernarr Macfadden for "upkeep, expense, maintenance and support, including rent and or carrying charges of the home" was adjudicated. That is a necessary implication of the consent judgment referred to above.

Defendants allege that the agreement of April 7, 1932 is "illegal" since it is an agreement to pay alimony and that the estate created by that agreement was therefore void *ab initio*.

We are not unmindful of the principle relating to agreements for the payment of alimony as enunciated in *Apfelbaum* v. *Apfelbaum*, 111 N. J. Eq. 529, 162 A. 543, 84 A. L. R. 298 (E. & A. 1932), and the numerous decisions which follow that leading case. See *Harrington* v. *Harrington*, 142 N. J. Eq. 684, 61 A. 2d 466 (E. & A. 1948), and the cases cited therein.

It must be remembered, however, that contracts between husband and wife, other than for alimony, although void at law, are enforceable in equity to the extent that they are equitable and fair. *Raymond* v. *Raymond*, 39 N. J. Super. 24, 120 A. 2d 270 (Ch. Div. 1956); *Van Inwegen* v. *Van Inwegen*, 4 N. J. 46, 71 A. 2d 340 (1950); *Bendler* v. *Bendler*, 3 N. J. 161, 69 A. 2d 302 (1949). Where, as here, a contract which concerns a property settlement between husband and wife, unless unfair and unjust, should be enforced. The agreement here sued upon is not one solely for alimony. The plaintiff, in consideration of the granting of the life estate, discontinued a suit then pending in the Supreme Court of the State of New York and assigned and transferred certain shares of stock in Macfadden Publications, Inc. to Bernarr Macfadden. We feel the agreement "ought to be enforced in equity as part of what seems to [us] a fair and equitable property settlement by the parties in other respects fully executed to the considerable benefit of the husband." *Raymond* v. *Raymond*, *supra*, (39 N. J. Super. at page 31, 120 A. 2d at page 273).

Generally, in order to rescind a contract, the party seeking such relief must proffer the return of the consideration received by him. *Green* v. *Stone*, 54 N. J. Eq. 387, 34 A. 1099 (E. & A. 1896); *Dencer* v. *Erb*, 142 N. J. Eq. 422, 60 A. 2d 282 (Ch. 1948). Defendants make no offer to place plaintiff *in statu quo*, nor is it conceivable how they could possibly attain such a result.

Judgment affirmed.

APPENDIX B

Constitutional Provision Involved

ARTICLE IV—STATES—RECIPROCAL RELATIONSHIP BETWEEN STATES AND WITH UNITED STATES

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Statute Involved

U.S.C.A. Title 28, Sec. 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 233

CITY BANK FARMERS TRUST COMPANY, as Trustee under Deed of Trust made by Bernarr Macfadden, dated April 7, 1932 for the benefit of Mary Macfadden, and

MARY MACFADDEN,

Petitioners,

—against—

BERNARR MACFADDEN FOUNDATION, INC., and EDWARD F. BODIN and PAUL WINKLER, as Executors of the Last Will and Testament of Bernarr Macfadden, deceased,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

SIMON H. RIFKIND
Attorney for Respondents
575 Madison Avenue
New York 22, New York

EDWARD N. COSTIKYAN,
JOHN LYON,
575 Madison Avenue
New York 22, New York
Of Counsel

July 11, 1963

IN THE

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Question Presented

Did the New York courts err in finding that a New Jersey judgment, in a prior litigation on a different cause of action, did not determine that respondent Bernarr Macfadden, Inc. was the "alter ego" of the late Bernarr Macfadden and therefore generally liable for his debts and obligations?

Statement

The parties to this action are petitioner City Bank Farmers Trust Company, as trustee of a trust established in 1932 by the late Bernarr Macfadden, for the benefit of his then wife, Mary Macfadden; petitioner Mary Macfadden; respondents Bodin and Winkler, as executors of Bernarr Macfadden; and respondent Bernarr Macfadden Foundation, Inc., a New York membership corporation and remainderman of the trust (R. 30).*

The action was brought by the trustee in the New York Supreme Court for judicial settlement of its accounts and for other relief (R. 14-29). Both petitioners also sought judgment against respondents holding them liable to perform an obligation, imposed on the late Bernarr Macfadden by a 1932 separation agreement with petitioner Mary Macfadden, to make up deficiencies in trust income (R. 24-29, 71-73). Petitioners alleged that they were entitled to such relief against the respondent Foundation on various grounds, only one of which is before this Court (Pet. 8):** petitioners claimed that a judgment in a prior New Jersey action between petitioner Mary Macfadden and respondents had determined that the Foundation was the "alter ego" of the late Bernarr Macfadden and hence liable for his obligations (R. 103-104). Petitioners claimed, and the trial court held, that this judgment was *res judicata* and required the Foundation to perform Bernarr Macfad-

* References preceded by "R." are to pages of the printed record.

** References preceded by "Pet." are to the petition herein or its appendices.

den's obligation to make up deficits in trust income (R. 104, 401).

Respondents appealed to the Appellate Division of the New York Supreme Court, which modified the trial court's judgment by deleting therefrom the paragraph imposing liability on respondent Foundation (R. 430).

In the Appellate Division, respondents argued that the prior New Jersey judgment was not *res judicata* in the present case, because it was based on a different cause of action. The Appellate Division so found (R. 427, 437; Pet. A6). Petitioners concede that the New York and New Jersey cases involved different causes of action (Pet. 11).

Respondents further argued in the Appellate Division that the New Jersey judgment was binding and conclusive only to the extent that it actually determined issues common to both cases, under the doctrine of "collateral estoppel." They contended that the New Jersey action, which involved only Mary Macfadden's rights in certain New Jersey real estate, and which expressly excluded any issue as to her "support" under the separation agreement (R. 328), did not determine that the Foundation was Bernarr Macfadden's "alter ego."

The Appellate Division, two justices dissenting, found that the New Jersey judgment had not determined that the Foundation was Bernarr Macfadden's "alter ego"; and that the New Jersey judgment rested on an entirely different determination that Mary Macfadden had a life estate in the New Jersey real property (R. 427-428, 434-443; Pet. A3-A12). Ac-

cordingly, the Appellate Division held that the New Jersey judgment was not conclusive of the "alter ego" issue since it had not determined that issue (R. 443-444; Pet. A11-A12).

Petitioner's "Statement" misleadingly asserts that the Appellate Division

> "reversed the [trial court's] findings that the court was bound by the prior adjudication that the Foundation was the alter ego of Bernarr Macfadden and therefore responsible for his obligations under the separation agreement. It made new findings to the contrary (R. 424-428)" (Pet. 9).

The Appellate Division fully recognized that such a prior adjudication would be binding and conclusive (Pet. A7); but it found that there was no such adjudication (Pet. A8-A11; R. 427-428).

The Appellate Division was affirmed, without opinion, by a unanimous New York Court of Appeals (Pet. A15-A16).

Petitioners claim that the action of the New York courts

> "renders sterile the New Jersey decree, for absent trust income Mrs. Macfadden cannot defray her 3/10ths share of the cost of the [New Jersey] home" (Pet. 13).

This claim is rebutted by facts in the record which petitioners did not state. The record shows that in all years in issue there was substantial trust income, averaging $10,179.13 a year (R. 188-189). The record further shows that even if there were no trust income

the Foundation would be obliged by the New Jersey decree to pay the cost of the home (R. 343-344, 427, 437; Pet. A6). No disposition in this action can affect petitioner Mary Macfadden's right to live in the New Jersey home as long as she wishes to.

ARGUMENT

The decision below presents no substantial question of constitutional law.

This Court's Rule 19 sets forth various considerations governing review on certiorari. Only one of the criteria warranting the grant of certiorari is even arguably relevant to this case:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." (Rule 19[1(a)].)

This case does not come within the rule. The courts below decided no substantial federal question; nor were their determinations in conflict with decisions of this Court.

The controversy between petitioners and respondents is narrow and of little interest to anyone other than them. The parties dispute what effect should be given to a judgment in a prior New Jersey action between petitioner Mary Macfadden and respondents.

Petitioners and respondents agree that the New Jersey judgment should be given full faith and credit in the courts of New York.

Petitioners and respondents also agree that the prior New Jersey litigation involved a cause of action different from the cause of action in the present New York litigation (Pet. 11).

Accordingly, petitioners and respondents agree that the New Jersey judgment is binding and conclusive between them in the present action only as to issues actually determined by the New Jersey court (Pet. 12).

They disagree on only one issue: what determination was made by the New Jersey court. Petitioners claim that the New Jersey court determined that respondent Bernarr Macfadden Foundation, Inc. ("the Foundation") was merely an "alter ego" of the late Bernarr Macfadden, in a sense which would make the Foundation generally liable for claims against Macfadden. Accordingly, they contend, the Foundation must pay to petitioner City Bank Farmers Trust Company, as trustee, various sums to make up for deficiencies in the income of a trust which Bernarr Macfadden established in 1932 for the benefit of his wife, petitioner Mary Macfadden.

Respondents deny that the New Jersey court made any such determination. They contend that there was no determination of the "alter ego" issue, and that the New Jersey court rested its judgment on a narrower determination of Mary Macfadden's rights in certain New Jersey real property.

The Supreme Court of the State of New York, Appellate Division, First Department, agreed with respondents that no determination was made in New Jersey that the Foundation was Bernarr Macfadden's

"alter ego" (Pet. A8 A9). Two justices dissented (Pet. A12).

The New York Court of Appeals unanimously affirmed the judgment of the Appellate Division, without opinion (Pet. 2, A15-A16). The Court of Appeals must necessarily have agreed with the majority of the Appellate Division that the New Jersey court had made no "alter ego" determination; had it disagreed, it could only have reversed the judgment of the Appellate Division.

The Court of Appeals also denied petitioners' motion to amend its remittitur to recite that a constitutional issue had been presented and passed upon (Pet. A17). Petitioners suggest that this denial is "inexplicable" unless it be assumed that the Court of Appeals thought

> "that the constitutional question appears so clearly from the record that an amendment to the remittitur was unnecessary" (Pet. 2 Fn.).

There is, of course, an alternative and more tenable explanation: the Court of Appeals refused to amend its remittitur to recite a constitutional issue because there is no substantial constitutional issue. No party to this action has ever claimed, and no court has ever held, that the New Jersey judgment is not entitled to be given full faith and credit and treated as conclusive of any matters actually determined by it. The dispute is not whether, or to what extent, the New Jersey judgment should be given faith and credit. The dispute results only from conflicting views as to what the New Jersey judgment did, in fact, determine.

The merits of that dispute, which have no significance beyond the particular facts of this case, need not be treated here. The opinion of the New York Appellate Division, printed in the Petition at A1 to A12, is a full discussion of the complex facts on which that court based its finding that the New Jersey judgment made no "alter ego" determination. A reading of that opinion will show that the New York courts have not "decided a federal question of substance" (Rule 19[1(a)]), but have merely construed a judgment in the light of a specific set of facts having no general significance.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

July 11, 1963

Respectfully submitted.

SIMON H. RIFKIND
Attorney for Respondents

EDWARD N. COSTIKYAN,
JOHN LYON,
575 Madison Avenue
New York 22, New York
Of Counsel